(4)

No. 91-1849-CFY
Status: DECIDED

Title: Manuel Costa, Petitioner
v.
United States

Docketed:
April 20, 1992

Court: United States Court of Appeals for the Eleventh Circuit

Counsel for petitioner: Raben,Peter

Counsel for respondent: Solicitor General

40 cps of ptn rcd 04-20-92, 1 retained; 40 corr copies of ptn rcd 05-18-92.

Entry	Date	Note	Proceedings and Orders
1	Apr 20 1992	D	Petition for writ of certiorari filed.
3	Jun 24 1992		Order extending time to file response to petition until July 25, 1992.
4	Jul 23 1992		Brief of respondent United State in opposition filed.
5	Jul 29 1992		DISTRIBUTED. September 28, 1992
7	Oct 5 1992		REDISTRIBUTED. October 9, 1992
8	Oct 13 1992		Petition DENIED. Dissenting opinion by Justice White with whom Justice O'Connor joins. (Detached opinion.)

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(1)

91-1849

No._____

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MANUEL COSTA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Should this Court resolve the patent conflict among the circuits as to whether the plain language and legislative history of Title 18 U.S.C. Section 4205 permits a sentencing court to designate a minimum length of sentence greater than ten years before eligibility for parole?

2. When the trial court excluded defense testimony for two substantive reasons, and under the balancing test of Rule 403 F.R.E., and the circuit court found the exclusion harmful and erroneous but within the trial court's discretion, does the sixth amendment to the United States Constitution allow the flawed Rule 403 analysis to be affirmed without de novo review by the circuit court, or a remand to the district court?

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OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported as follows: United States v. Manuel Costa, et al, 947 F.2d 919 (11th Cir. 1991). A copy of that opinion is appended hereto in the Appendix (hereinafter "Pet. App.") at 1. An unpublished order entitled On Petition(s) for Rehearing and Suggestion(s) of Rehearing En Banc denied such requested relief on January 27, 1992. See Pet. App. at 39-40. That appeal arose from a judgment and commitment order entered in the trial court on August 11, 1989. See Pet. App. at 41-43.

JURISDICTION

The judgment of the United States Court of Appeal for the Eleventh Circuit was entered on November 25, 1991. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on January 27, 1992. The jurisdiction of this Court to review the judgment of the Eleventh Circuit is conferred under Title 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Sixth Amendment to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor;

18 U.S.C. Sections 4205 (a) and (b)

§4205. Time of eligibility for release on parole

(a) Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

(b) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for

parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the commission may determine.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Manuel Costa, Defendant and Appellant in the courts below, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeal for the Eleventh Circuit entered in this case on November 25, 1991.

STATEMENT OF THE CASE

A. Introduction

This case raises two important issues of national scope which have divided the circuit courts of appeal.

1. The trial court sentenced Mr. Costa to a term of imprisonment of sixty years and ordered, pursuant to 18 U.S.C. Section 4205(b)(1), that he serve a minimum of twenty years in prison before he could be eligible for parole. Petitioner contends that the plain language and legislative history of 18 U.S.C. Sections 4205(a) and (b) prevent a trial court from designating a minimum length of sentence greater than ten years before a prisoner is eligible for parole. The issue of whether courts can set minimum parole eligibility dates beyond ten years has been highly contested, and the circuit courts of appeal are split

five to four on this issue. This Petition should be granted so that this Court can resolve a major sentencing issue and provide badly needed guidance to those sharply divided courts of appeal.

2. The district court excluded significant portions of the testimony of a defense witness who would have tended to show Mr. Costa was not involved in the smuggling operation. The trial court barred the testimony under two theories: it found the testimony related to a different conspiracy than the one at trial, and irrelevant, and it found the witness' testimony to be extrinsic evidence of specific acts, and inadmissable under Rule 608(b).

Cumulating these two theories of inadmissibility, the district court excluded the proposed testimony, finding the probative value of the testimony

"substantially outweighed" by the evidence's tendency to cause undue prejudice.

The Court of Appeal for the Eleventh Circuit found that the proposed testimony was admissible on the grounds of relevancy, as the issue of multiple conspiracies was one of fact for the jury. That court also found the testimony admissible under Rule 608(b). Nevertheless, the circuit court affirmed the district courts exclusion, according the trial judge the broadest discretion under Rule 403; the circuit court noted that it would have ruled differently were the panel conducting de novo review.

The circuit court should not have been bound by the abuse of discretion standard. The district court erroneously believed the testimony was irrelevant. Its discretion was not called into

question; its interpretation of the law was mistaken. De novo review is appropriate upon circuit court review when a district court has misinterpreted a rule of law. Exclusion of exculpatory testimony denied Mr. Costa his sixth amendment right to present a defense on his own behalf.

B. **Proceedings Below**

On March 3, 1987, a federal grand jury indicted fourteen individuals on various narcotic-related charges concerning the importation and distribution of cocaine. On May 12, 1987, the grand jury issued a superseding indictment naming one additional defendant. On August 30, 1987, the grand jury issued a second superseding indictment naming four more individuals,

including Mr. Costa.[1]

Mr. Costa pled not guilty, and proceeded to trial before a jury along with five co-defendants. After a six week trial, Mr. Costa was found guilty on all counts. Mr. Costa was sentenced on August 11, 1989, to a cumulative term of sixty years. The lower court, pursuant to 18 U.S.C. Section 4205(b)(1) (1976), ordered that Mr. Costa would not be eligible for parole until he served one-third of his sentence.

The Petitioner challenged on his appeal to the Eleventh Circuit the exclusion of a portion of a defense

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[1] Mr. Costa was charged with conspiring to import cocaine between November 1984 and July 1985, with conspiracy to possess cocaine with intent to distribute between November 1984 and July 1985, and in four counts of importation of cocaine related to drug importations in January and February of 1985.

witness' exculpatory testimony, the admission of extrinsic crime evidence of prior drug smuggling, the imposition of multiple sentences imposed for the same offense, and the validity of the district court's retention of jurisdiction over parole. In an opinion rendered on November 25, 1991, the Eleventh Circuit Court of Appeal affirmed Mr. Costa's convictions and sentences. A timely Petition for Re-hearing and Suggestion for Re-hearing En Banc was filed, and subsequently denied by the circuit court on January 27, 1992. See Pet. App. at 39-40. This petition then ensued.

C. Statement of Facts

1. The District Court Excluded the Relevant Testimony of the Defense Witness at Trial.

The case against Mr. Costa comprised of testimonial accusations from conspirators who had made plea agreements

to testify on behalf of the Government in return for leniency. Their testimony was uncorroborated. Mr. Costa met this assault by calling to the stand a man, Roger Furbee, who would have testified that he was a co-conspirator with Government witnesses concerning the activities in the indictment, and well knew their plans and associates. He would have also testified that he was unfamiliar with Mr. Costa, and would refute the Government's claim of Mr. Costa's involvement.

The district court heard a proffer of Mr. Furbee's testimony and excluded those portions which were germane to Mr. Costa. It appeared to the trial court that Furbee's activities were not positively associated to the conspiracy in the indictment, hence were irrelevant. Also, the trial court saw Furbee's testimony as

inadmissible impeachment of the Government's witnesses, and excluded it under Rule 608. The court having found Furbee's evidence to have no probative value, the proposed testimony was deemed by the trial judge as excludable under Rule 403. Mr. Costa presented no other defense and was convicted on all counts.[2]

2. The Petitioner is Sentenced to Sixty Years, and His Parole Eligibility is Doubled by the Use of Section 18 U.S.C. Section 4205.

Mr. Costa was sentenced on August 11, 1989. He received a cumulative sentence of sixty years incarceration. The trial court invoked 18 U.S.C. Section 4205(b)(1) to retard Mr. Costa's parole eligibility until one-third of his sentence had been

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[2] The Government's whole cloth was not bought by the jury. Two co-defendants who were also accused by the Government's witnesses were acquitted on all counts. The four remaining co-defendants were convicted.

served, or twenty years.

3. The Circuit Court Disapproves of the District Court's Exclusion of the Defense Testimony, and Disapproves of the District Court's Findings that the Witness had no Probative Value.

The circuit court addressed the two grounds relied upon by the trial judge to exclude Furbee's testimony. The district court sua sponte found the testimony related to a different conspiracy based upon differences in recollection on the specific operation of the importations. This finding caused the trial judge to conclude the admission of this irrelevant testimony would violate Federal Rule of Evidence 403, as it had no probative value. The trial judge went further, and found the admission of Furbee's testimony was also improper impeachment by extrinsic evidence of specific incidents of misconduct, and barred the testimony under Federal Rule of Evidence 608(b).

The circuit court found that both conclusions by the district court were errors of law. Nevertheless, it applied an abuse of discretion standard to the court's Rule 403 analysis.

First, the circuit court found that whether Furbee's testimony related to the conspiracy on trial was a factual issue which should have been submitted to the jury as the finder of fact. The circuit court found Furbee's testimony to be relevant under Rule 104, rather than non-probative, under Rule 403. See Pet. App. at 14-15. The circuit court even acknowledged that "Furbee's proffered testimony would have tended to exculpate Appellants." Pet. App. at 12.[3] Next, the

[3] The circuit court wrote, "in the case sub judice, Furbee's proffered testimony would have tended to exculpate Appellants. If Furbee was an active participant with several of the principals in the conspiracy and imported cocaine

circuit court rejected the judge's finding that Furbee's testimony was improper impeachment under Rule 608(b). The court held "that even if Furbee's proffered evidence was extrinsic, because it also 'contradict[ed] material testimony ... it [was] relevant evidence and [could] no longer [be] considered collateral.' [citation omitted] ... Furbee's proffered testimony was directly relevant to the material issue of the appellants alleged participation in the smuggling operations." Pet. App. at 21.

(Footnote 3 cont.)

into the United States with them on several occasions, then evidence that Furbee did not know the defendants would tend to establish their lack of participation in the importation phase of the conspiracy and thus their innocence." See Pet. App. at 14, fn. 5.

4. The Circuit Court Affirms the District Court's Exclusion of the Witness Under Rule 403 Without conducting Plenary Review or Remanding to the District Court for Reconsideration.

The circuit court found the trial judge's analysis of Furbee's evidence wrong on both legal points. It found that Furbee would have offered relevant, probative and exculpatory testimony in a case with no corroboration of the Government's informants. It even wrote that it would probably have admitted all of Furbee's testimony had it conducted a de novo review.

The circuit court affirmed the district court's right to be wrong by utilizing the abuse of discretion standard in its analysis of the Rule 403 exclusion. Mr. Costa would contend herein that the district court's errors were of law, and enabled de novo review, or at least a

remand to the district court for a proper weighing of Furbee's testimony under Rule 403.

REASONS FOR GRANTING THE WRIT

I.

THE TRIAL COURT EXCEEDED THE STATUTORY AUTHORITY OF 18 U.S.C. SECTION 4205 IN SETTING MINIMUM PAROLE ELIGIBILITY DATES BEYOND TEN YEARS.

Petitioner contends that the language and legislative history of 18 U.S.C. Sections 4205(a) and (b) prevent a trial court from designating a minimum length of sentence greater than ten years before a prisoner is eligible for parole. The issue of whether courts can set minimum parole eligibility dates beyond ten years has been hotly contested, and the federal circuit courts of appeal are split five to four on this issue. This Petition should be granted so that this Court can resolve a major sentencing issue and provide badly

needed guidance to those sharply divided courts of appeal.

A. The Facts and Statutory Scheme

The trial court sentenced Manuel Costa to sixty years in prison. The trial court sentence Mr. Costa pursuant to 18 U.S.C. §4205(b)(1), and ordered that Mr. Costa serve a minimum of twenty years before he shall be eligible for parole.[4]

Section 4205 of Title 18 of the United States Code governs the time of eligibility for release on parole. Section 4205(a) states that a prisoner shall be eligible for parole after serving

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[4] The Parole Commission and Reorganization Act of 1976, codified at 18 U.S.C. §4201, et seq., is applicable to Mr. Costa's case based on the relevant dates of the offense conduct, even through the statutory parole scheme was repealed by the Comprehensive Crime Control Act of 1984. Defendants whose offense conduct occurred after November 1, 1987 are now sentenced pursuant to the federal sentencing guidelines.

one-third of a sentence or "after serving ten years of a life sentence or a sentence of over thirty years, except to the extent otherwise provided by law."[5] Although Mr. Costa's twenty year parole eligibility date is one-third of his sixty year sentence, that parole eligibility date exceeds the ten year cap mandated by §4205(a). The resolution of this issue requires, therefore, an interpretation of the relationship between §§4205(a) and (b), as well as the legislative history. These issues have caused considerable confusion and disagreement among the circuit courts of appeal.

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[5] Section 4205(b)(1) states that a trial court may designate a minimum term of imprisonment before the defendant is eligible for parole, which term "shall not be more than one-third of the maximum sentence imposed by the court." The entire text of 18 U.S.C. §4205(a) and (b) is reprinted above at x-xi.

B. The Circuit Courts of Appeal are Deeply Divided on the Parole Eligibility Issue

Nine circuit courts of appeal have addressed the issue of whether a court may set a minimum parole eligibility date in excess of ten years. Four circuits have held that, pursuant to 18 U.S.C. §4205 and its legislative history, a court may not designate a minimum length of sentence greater than ten years before a prisoner is eligible for parole. See United States v. Hagen, 869 F.2d 277 (6th Cir.), cert. denied 109 S.Ct. 3228 (1989); United States v. DiPasquale, 859 F.2d 9 (3rd Cir. 1988); United States v. Castonguay, 843 F.2d 51 (1st Cir. 1988); United States v. Fountain, 840 F.2d 509 (7th Cir.) cert. denied 109 S.Ct. 533 (1988). Five circuits, including the Eleventh Circuit below, have held to the contrary. See United States v. Berry, 839 F.2d 1487

(11th Cir.), cert. denied 479 U.S. 1104 (1987); United States v. Varca, 896 F.2d 900 (5th Cir. 1990); Rothgeb v. United States, 789 F.2d 647 (8th Cir.), cert. denied, 475 U.S. 1020 (1986); United States v. O'Driscoll, 761 F.2d 589 (10th Cir.), cert. denied, 106 S.Ct. 1207 (1986). United States v. Gwaltney, 790 F.2d 1978 (9th Cir.), cert. denied, 479 U.S. 1104 (1987).[6]

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[6] The confusion that parole eligibility issues have caused is further underscored by opinions on related issues. Although the Ninth and Eleventh Circuits have authorized courts to set parole eligibility dates greater than ten years, they have ruled that where a defendant is sentence to life in prison the court may not set a parole eligibility date beyond ten years. See United States v. Tidmore, 893 F.2d 1209 (11th Cir.) 1990); United States v. Kinslow, 860 F.2d 963 (9th Cir.)., cert. denied, 110 S.Ct. 96 (1989). The rulings are based on the premise that a life sentence is an unqualifiable term and there is no way to calculate, pursuant to Section 4205(b)(1), what one-third of "life" is. These two circuits now countenance the anomalous result that a defendant with a life sentence is eligible

C. The Interpretation, Policy and Legislative History of 18 U.S.C. Section 4205

A fair reading of 18 U.S.C. §§4205(a) and (b), as well as the policy behind and extensive legislative history of §4205, indicates that Congress passed §4205 to give courts the option only to reduce to less than ten years the term to be served before becoming eligible for parole.

Section 4205 could admittedly be interpreted in more than one way. For example, the last clause of §4205(a), "except to the extent otherwise provided by law," could be interpreted to provide an exception to the ten year limit set, and that 4205(b)(1) could be such an exception. Such an interpretation creates

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(Footnote 6 cont.)

for parole after ten years, while a defendant with a sentence of a long term of years could serve far in excess of ten years before being eligible for parole.

an anomaly and could lead to inherently unfair results. The perpetrator of a heinous crime is "eligible for parole after 10 years because he receives a "mere" life sentence - while confederates with lesser responsibility may receive life in prison without possibility of parole if the judge imposes, say, a 300 year sentence with 100 year minimum under §4205(b)(1)." See Fountain, 840 F.2d at 518. The legislative history, discussed below, indicates that Congress had contemplated and rejected such an incongruity and did not intend to allow courts to exceed the ten year cap on parole eligibility.

In 1913, "a federal prisoner serving a life term became eligible for parole after having served fifteen years, while a prisoner serving a sentence for a specific term of years became eligible for parole

after serving one-third of that sentence." See Hagan, 869 F.2d at 289, discussing 37 Stat. 650 (1913). The statutory scheme thus created the very anomaly identified in Fountain. Offenders serving life sentences for heinous crimes became eligible for parole earlier than prisoners sentenced to terms of incarceration greater than forty-five years for less serious crimes.

Congress recognized this incongruity and in 1951 enacted 28 U.S.C. §4205, which stated that a prisoner "may be released on parole after serving one-third of such term or terms or after serving fifteen years of a life sentence or of a sentence of over forty-five years." Thus, between 1951 and 1958, offenders sentenced to any term of years greater than forty-five, regardless of how much greater, would not be eligible for parole before service of

fifteen years, and the courts lacked authority to modify such parole eligibility. This dilemma, as well as prevailing trends in criminal justice demanding indeterminate sentencing, led to enactment of a modified parole statute. See 72 Stat. 845-46 (August 25, 1958).

The Department of Justice made a strong plea for eliminating minimum eligibility for parole.[7] The newly proposed legislation garnered support from the Administrative Office of the United States Courts on behalf of the Judicial Conference, which stated that "[t]his is a bill to authorize the court in sentencing a prisoner to fix an earlier date when the prisoner shall become eligible for parole." See Fountain, 840

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[7] See e.g., letter from Deputy Attorney General Lawrence E. Walsh to Senator James O. Eastland, 1958 U.S. Code Cong. & Admin. News at 3891.

F.2d at 521 (original emphasis). "The function of the new language [as enacted into law] was to move in the direction of indeterminate sentencing - that is, earlier eligibility for parole - at the judge's option, and not to create an option to restore the incongruity that had been eliminated seven years before." Id, at 522 (emphasis added).[8]

The legislative history [9] indicates,

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[8] Congress revamped the parole system once again by enacting the Parole Commission and Reorganization Act of 1976, 18 U.S.C. §4201, which recodified the 1958 Statute at 18 U.S.C. §4205(b), but did not alter the substance or language of the relevant statute. The only significant change in the 1976 and 1958 legislation was the reduction from 15 to 10 years as the minimum parole eligibility date for offenders serving sentences of 30 years to life.

[9] For a more extensive analysis of the legislative history of Section 4205, see supra United States v. Hagen, 869 F.2d 277 (6th Cir.), cert. denied, 109 S.Ct. 3228 (1989); United States v. DiPasquale, 859 F.2d 9 (3rd Cir. 1988); United States v. Fountain, 840 F.2d 509 (7th Cir.),

therefore, that the possibility of parole on a term of years being available later than parole on a life sentence, was expressly considered and eliminated in 1951. In 1958, Congress did not consider or mean to revive this possibility. Thus, Congress never intended that §4205 would allow a court to set a minimum parole eligibility date beyond ten years.[10]

D. Policy Considerations

The parole eligibility issue is extremely important to public policy given the widely disparate sentences that

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cert. denied, 109 S.Ct. 533 (1988).

[10] This interpretation also comports with that of the Federal Judicial Center, which prepared a widely disseminated training manual that states, "[i]n the sentence, the judge may designate an earlier parole eligibility date or specify that the prisoner is immediately eligible. 18 u.S.C. §4205(b)(1), (2)." See Partridge, The Sentencing Options of Federal District Judges at 3 (1985) (Revised Edition) (emphasis added).

offenders could receive for identical crimes depending on in which circuit the offender is convicted. Moreover, the anomaly that Congress eliminated in 1951 has been revived by the judiciary in certain circuits. That is, heinous criminal offenders receiving life or lengthy term of years sentences could be eligible for parole ahead of lesser offenders.

Notwithstanding that the Federal Sentencing Guidelines, which have abolished the parole system, and now govern all criminal cases where the offense conduct occurred after November 1, 1987, the problems with Section 4205 are not likely to go away in the near future. The Government is constantly investigating and indicting cases where the events under scrutiny occurred a number of years ago. The sweep of RICO and conspiracy

indictments are traditionally broad. In addition, "historical" indictments are likely to persist for some time given that the statute of limitations governing a variety of crimes relating to bank fraud has been extended from five to ten years. See FIRREA, p.l. 101-73, 103 Stat. 183 at par. 930 (1989).

In short, the parole eligibility issue in this case presents this Court with the opportunity to resolve a major sentencing issue which will affect many criminal convictions and to provide badly needed guidance to the hopelessly fractured circuit courts of appeal.

II.

THE CIRCUIT COURT'S APPLICATION OF THE ABUSE OF DISCRETION STANDARD, RATHER THAN DE NOVO REVIEW, TO THE DISTRICT COURT'S MISAPPLICATION OF THE FEDERAL RULES OF EVIDENCE, DENIED THE PETITIONER HIS SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE.

Petitioner contends that the circuit court applied the wrong standard of review to the errors committed by the district court in the exclusion of relevant and exculpatory defense testimony. The circuit court, on undisputed facts, deferred to the lower court's discretion in disallowing evidence under Rule 403. Instead, the circuit court should have applied de novo review, as the error was in the misapplication of Rule 403, rather than in the interpretation of facts or credibility.

A. The District Court's Exclusion of Defense Testimony was Based upon a Legal Misapplication of Rule 403

The opinion filed by the Eleventh

Circuit Court of Appeal makes it clear that Furbee's exculpatory testimony was erroneously excluded. Furbee testified that he participated in an importation conspiracy with several of the Government witnesses, during the time-frame and in the locale of the conspiracy alleged in the Indictment, yet did not know Mr. Costa - one of the ringleaders, according to the Government. The district court found this portion of Furbee's testimony irrelevant; the court made the factual finding that Furbee's conspiracy was different than the one on trial.

Other portions of Furbee's testimony contradicted the testimony of several Government witnesses, and insinuated they were liars. The trial court saw this aspect of the testimony as extrinsic act impeachment, and disallowed it under Rule 608(b). This ruling was one of law, as no

factual interpretation was required.

Cumulating these two results, the district court made a Rule 403 determination as well. The judge found that the prejudicial effect of Furbee's testimony outweighed any probative value it might have. This factual determination is what misled the circuit court into utilizing an abuse of discretion standard.

On closer examination, the district court's Rule 403 factual weighing was invalid from the outset because of two prior legal errors. Although the circuit court recognized the two legal errors, it erroneously followed the abuse of discretion standard.

The circuit court found that the judge's factual belief that Furbee's testimony related to a second conspiracy was legally incorrect. The court held that such fact-weighted issues are to be

resolved by a jury, upon proper instruction, rather than by the trial judge. See Pet. App. at 15. The circuit court next held that the judge's ruling that Furbee's testimony was impermissible impeachment under Rule 608(b) was also legally incorrect, as it reflected upon the material credibility of a witness. Notwithstanding the trial judge's two errors of law, the circuit court deferred to the district court in its Rule 403 balancing. But that, too, was an error of law. The district court made the finding that the prejudicial effect of Furbee's evidence outweighed its probative value. But, the district court made that finding after its two legally incorrect determinations regarding the admissability of Furbee's testimony. In reality, the Rule 403 weighing test was tainted by the trial judge's two earlier mistakes of law.

Rather than a Rule 403 factual weighing, which is normally the case, this Rule 403 weighing was following the errors of law, and tainted by the district court's belief that Furbee's testimony had no probative value.

B. The Circuit Court's Utilization of the Abuse of Discretion Standard to a Matter of Law is in Conflict with Established Precedent Among the Circuits

An appellate court will review questions of fact under the deferential clearly erroneous standard. See Fed.R.Civ.P.52(a). Questions of law are reviewed under the non-deferential de novo standard. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969). Issues on appeal which involve a mixed question of fact and law are also reviewed under the de novo standard.[11] The application of a rule of law to a set of undisputed facts constitutes a mixed question of law and fact, and requires de

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[11] See United States v. Hazine, 762 F.2nd 34 (6th Cir. 1985); United States v. Murillo, 933 F.2nd 195 (3rd Cir. 1991); United States v. Austin, 933 F.2nd 833 (10th Cir. 1991); United States v. Burton, 933 F.2nd 916 (11th Cir. 1991); United States v. Richards, 937 F.2nd 1287 (7th Cir. 1991).

novo review. United States v. General Motors Corp., 384 U.S. 127, 141 n.16 (1966); Pullman-Standard v. Swint, 456 U.S. 273 (1982).

The Eleventh Circuit was faced with a mixed question of law and fact in reviewing the trial judge's Rule 403 evaluation. The facts were undisputed; Furbee's proffered testimony was either relevant and probative, thus admissible; or irrelevant, and outweighed by its prejudicial effect. The circuit court having concluded the evidence was relevant, it was then bound to review the trial judge's legal misapplication under a de novo standard.

The circuit court's failure to do so conflicts with established rules of law. Additionally, another line of precedent also exist in conflict with the circuit court's ruling.

Generally, the factual determination in a Rule 403 evaluation is reviewed under the abuse of discretion standard. But a higher level of scrutiny exists when the argument is raised to a federal constitutional level. A judge's decision to admit or exclude evidence is not discretionary when constitutional rights are at stake. United States v. Gentile, 816 F.2d 1157 (7th Cir. 1987); Petrucelli v. Coombe, 735 F.2d 684 (2nd Cir. 1984). Non-constitutional evidentiary errors are reviewed with considerable leniency towards the trial judge's broad power; review is more circumspect when substantial rights are in issue. United States v. Emmert, 829 F.2d 895 (9th Cir. 1987); United States v. Chu Kong Yin, 935 F.2d 990 (9th Cir. 1991); United States v. Pretel, 939 F.2d 233 (5th Cir. 1991); United States v. Lash, 937 F.2d 1077 (6th

Cir. 1991). Substantial rights -- the sixth amendment -- were at stake here.

C. Absent De Novo Review on a Matter of Law, or a Remand for Reconsideration by the District Court, the Petitioner has been Denied Due Process of Law and the Right to Present a Defense

The circuit court's failure to review de novo the exclusion of critical defense testimony denied Mr. Costa his right to present witnesses on his own behalf. See Amend. VI, U.S. Constitution. "Few rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers v. Mississippi, 97 S.Ct. 1038 (1988); California v. Trombetta, 104 S.Ct. 2528 (1984).

The issue before the Eleventh Circuit was whether Mr. Costa could advance the defense of innocence through the testimony of Furbee. That court's use of the abuse of discretion standard to exclude that evidence implicated a fundamental

constitutional right. De novo review was required.

Alternatively, it was appropriate for the circuit court to remand the matter to the district court for a re-weighing of the Rule 403 issue. The appellate court, having enlightened the trial judge of its flawed legal analysis, should have provided the original tribunal with an opportunity to re-visit the claim.

CONCLUSION

For all the foregoing reasons, therefore, Mr. Costa respectfully submits that this Court should grant this Petition for Certiorari.

Respectfully submitted,

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By: Peter Raben
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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing was mailed this 17 day of April, 1992 to: **SOLICITOR GENERAL**, Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. 20530; and to **LINDA COLLINS HERTZ, A.U.S.A.**, Office of the U.S. Attorney, 155 South Miami Avenue, Room 700, Miami, Florida 33130.

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APPENDIX

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UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

MANUEL COSTA, Debra Maxine Perry, Rene Totorica Nunez,
Defendants-Appellants.

No. 89-5874.

United States Court of Appeal,
Eleventh Circuit.

Nov. 25, 1991.

Appeal from the United States District Court for the Southern District of Florida.

Before FAY, Circuit Judge, JOHNSON[1]*, Senior Circuit Judge and [illegible]IGE[2]**, Senior District Judge.

JOHNSON, Senior Circuit Judge:

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[1] *See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

[2] **Honorable Robert R. Merhige, Jr., Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

This case arises on appeal following the appellants' convictions on drug trafficking charges. Because the appellants have failed to establish any errors below justifying reversal, we affirm the appellant's convictions.

I. STATEMENT OF THE CASE

A. BACKGROUND FACTS

Between January and July 1985, a group of south Florida smugglers, allegedly including appellants Costa, Nunez, and Perry, imported cocaine from the Bahamas into Florida. The smugglers made at least four trips over the course of six months, bringing over 1,800 kilograms of cocaine into the United States.

The group picked up cocaine flown to the Bahamas from Colombia, loaded the cocaine aboard boats in the Bahamas, and sailed to south Florida with their cargo,

where the cocaine was unloaded and delivered to distributors. United States Customs agents discovered the June load.

B. PROCEDURAL HISTORY

On March 3, 1987, a federal grand jury indicted fourteen individuals on various charges including conspiracy to import cocaine, importation of cocaine, conspiracy to possess cocaine with intent to distribute. On May 12, 1987, the grand jury issued a superseding indictment naming one additional defendant. On August 30, 1987, the grand jury issued a second superseding indictment naming four more individuals. Appellants Costa, Nunez and Perry were first named in the second superseding indictment. Costa, Nunez and Perry were all charged in count I with conspiring to import cocaine between November 1984 and July 1985, in violation of 21 U.S.C.A. §963 (1981), and in count

II with conspiracy to possess cocaine with intent to distribute between November 1984 and July 1985, in violation of 21 U.S.C.A. §846 (1981). Costa and Nunez were charged in counts IV, V, VII, and IX with the importation of cocaine related to drug importations in January and February of 1985, in violation of 21 U.S.C.A. §952(a) (1981) and 18 U.S.C.A. § 2 (1969). Nunez was also charged in counts III and X with possession of cocaine with intent to distribute in violation of 21 U.S.C.A. §841(a) (1981) and 18 U.S.C.A. §2. Finally, Perry was charged in counts VIII and XV with possession of cocaine with intent to distribute in violation of 21 U.S.C.A. §846.

All but six of the nineteen persons indicted pled guilty to the charges. However, appellants Costa, Nunez and Perry were among those who pled not guilty and

proceeded to trial. After a six week trial, a jury found Costa and Nunez guilty on all counts. Perry was found guilty on counts II, VIII, and not guilty on count I.

The district court sentenced all three defendants to terms well within the statutory limits for the relevant crimes.[1] Finally, the lower court, pursuant to 18 U.S.C.A. §4205(b)(1) (1976), ordered that Costa would not be eligible for parole until he served one-third of his sentence. Defendants Costa, Nunez, and Perry now bring a direct appeal for their criminal convictions before this Court.

II. ISSUES PRESENTED

Appellants raise nine issues on appeal. Three of these issues merit close examination and discussion by this Court.

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[1] Sentencing in this case predated the federal sentencing guidelines.

First, Costa, Nunez and Perry all allege that the district court abused its discretion by limiting the testimony of defense witness Roger Furbee. Second, Costa and Nunez claim that the district court abused its discretion by admitting extrinsic evidence of unindicted offenses related to drug smuggling. Finally, Costa and Nunez challenge their conviction on three counts of importing cocaine in the January 1985 importation, claiming that convictions on all three counts constituted impermissible multiplicity. The remaining six issues raise by the appellants do not warrant extended discussion and will be addressed summarily.

III. ANALYSIS

A. PARTIAL EXCLUSION OF ROGER FURBEE'S PROFFERED TESTIMONY

All three appellants claim that the

district court erred when it limited defense witness Roger Furbee's testimony. Furbee would have testified that, although he imported cocaine in February, March, and June of 1985 with three of the government's witnesses (Ellsworth, Hanlon, and Roloff), he had never seen or heard of appellants in connection with his smuggling. Furbee's testimony would have tended to show that the defendants were not, in point of fact, engaged in the smuggling operation. Because the only evidence linking the defendants to the importation phase of the operation was the testimony of government witnesses, the exclusion of significant portions of Furbee's testimony cannot be lightly dismissed.

The district court, after hearing Furbee's testimony outside the presence of a jury, held that Furbee could testify

about the June 1985 shipment, but prohibited him from testifying about the two other shipments in which he participated and his "standby status" for the January load. We review the district court's decision to exclude a significant portion of Furbee's proffered testimony under the abuse of discretion standard of review. *Richardson v. McClung*, 559 F.2d 395, 396 (5th Cir. 1977). *See also United States v. Beechum*, 582 F.2d 898, 915 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979).

The district court reached its decision to bar Furbee's exculpatory testimony under two separate analyses. The court found, sua sponte, that Furbee's involvement with Ellsworth related to a different conspiracy than the one alleged at trial. The court based this finding of unrelated conspiracies on Furbee's

inability to recall certain details regarding the boats used to import the cocaine and on differences in Furbee's recollection of the operations from the description provided by the other conspirators. The district court held that admission of Furbee's testimony regarding importations other than the June importation would tend to confuse the jury because the testimony related to a second conspiracy, and therefore that its admission would violate Federal Rule of Evidence 403.[2] The court also analyzed Furbee's proffered testimony under Rule 608(b).[3] The district court reasoned that

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[2] Rule 403 requires the exclusion of relevant evidence if its probative value is "substantially outweighed" by the evidence's tendency to cause undue prejudice. Fed.R.Evid. 403.

[3] Rule 608(b) prohibits the impeachment of a witness through extrinsic evidence, other than convictions, of specific instances of misconduct.

the defense was attempting to impeach the general credibility of Ellsworth, Hanlon, and Roloff with extrinsic evidence of specific instances of misconduct unrelated to the conspiracy at issue. Rule 608(b) "prohibits the use of extrinsic evidence merely to impeach the general credibility of a witness." *United States v. Calle*, 822 F.2d 1016, 1021 (11th Cir.1987). Thus, the trial court's characterization of Furbee's proffered testimony barred its introduction: Because the court found that Furbee was involved in a separate conspiracy, it analyzed his testimony under Rule 608(b) rather that Rules 401 and 402, and applied Rule 403 to exclude Furbee's testimony regarding the February and March shipments.

Although we are concerned by the

Fed.R.Evid. 608(b).

lower court's Rule 403 ruling, we are not prepared to hold that it constituted an abuse of discretion by the trial court. The abuse of discretion standard imposes a heavy burden on the party seeking to reverse a district court's evidentiary ruling. *See Balogh's of Coral Gables, Inc. v. Getz,* 798 F.2d 1356, 1358 (11th Cir.1986) (en banc). This is so for a good reason -- the trial court is in the best position to evaluate the credibility of witnesses and the relevance and probity of an evidentiary offering. *See United States v. Yellow Cab Co.,* 338 U.S. 338, 341-42, 70 S.Ct. 177, 179-80,94 L.Ed. 150 (1949). This Court may reverse a district court's evidentiary ruling only if it maintains a "definite and firm conviction that the [trial] court made a clear error of judgment based upon a weighing of the relevant factors." *Balogh's of Coral Gables, Inc.,* 798 F.2d at 1358. Although

the appellants' contentions regarding the exclusion of some of Furbee's proffered testimony presents a close question, we are ultimately unpersuaded that the district court should be reversed.

[1] Our analysis of whether the lower court abused its discretion begins with the observation that the law of this Circuit strongly favors admitting evidence that may or may not relate to the indicted conspiracy and allowing the jury to decide whether the evidence relates to the conspiracy at issue (and thus is relevant evidence) or whether it relates to a separate and unrelated conspiracy (and, consequently, is irrelevant). *United States v. Gonzalez*, 940 F.2d 1413, 1422 & 1422 n. 17 (11th Cir.1991). A district court should, in most circumstances, admit such evidence

with a Rule 104(b)[4] limiting instruction to the effect that the jury may consider the evidence only if it finds that the evidence relates to the indicted conspiracy. The jury, as the ultimate finder of fact, should be provided with all relevant information, especially when such information bears upon the ultimate guilt or innocence of the accused.[5]

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[4] Rule 104(b) provides that:

Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

[5] In the case *sub judice*, Furbee's proffered testimony would have tended to exculpate appellants. If Furbee was an active participant with several of the principals in the conspiracy and imported cocaine into the United States with them on several occasions, then evidence that Furbee did not know the defendants would tend to establish their lack of participation in the importation phase of the conspiracy and thus their innocence.

[2] Based on Furbee's testimony, it was possible, although not certain, that Furbee was acting as part of the same conspiracy in which the defendants allegedly participated. The trial court, in order to exclude portions of Furbee's testimony under Rule 403 because of a danger of jury confusion, had to find that the evidence established convincingly that Furbee's proffered testimony related to a conspiracy different from the indicted conspiracy. *See Gonzalez*, 940 F.2d at 1422. According to *Gonzalez*, the question of whether evidence relates to the indicted conspiracy is one of fact that should normally be left for the jury.[6] *Id.; see also*

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[6] This approach is entirely consistent with the law of this Circuit holding that "[a] single conspiracy does not become many simple [sic] because of the changing composition of the personnel comprising the conspiracy or because some members performed only a single function." *United States v. Meester*, 762 F.2d 867, 880 (11th

Fed.R. Evid. 104(b). So long as a potential witness can identify key details and individuals in the indicted conspiracy, thus establishing "general knowledge of the overall goals" of a conspiracy, the witness' proffered evidence should be admitted, unless on the specific facts of a particular case proffered evidence fails to meet the relevance/prejudice balancing test mandated by Rule 403. *See Gonzalez*, 940 F.2d at 1422.

[3] Were this panel conducting a *de novo* review of the district court's ruling, we would probably admit all of Furbee's proffered testimony. Based on the record before us, Furbee's testimony appears to be of the sort that, under *Gonzalez*, is

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(Footnote 6 cont.)

Cir.), *cert. denied sub nom.*, 474 U.S. 1024, 106 S.Ct. 579, 99 L.Ed2d 562 (1985).

properly left for the jury to consider. *Gonzalez*, 940 F.2d at 1422. The application of Rule 403 in conspiracy cases to exclude potentially relevant evidence (whether offered by a defendant or the government) because it might cause jury confusion will usually be inconsistent with the general rule favoring the admission of such evidence and allowing the jury to decide if it relates to the indicted conspiracy.[7]

This Court's role, however, is limited to reviewing the district court's determination for abuse of discretion. In this case, we are not prepared to say that

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[7] This is not to say that in a particular case a district court is precluded from finding that the relevance of specific evidence that may relate to the indicted conspiracy is "substantially outweighed" by its potential for prejudice. Fed. R.Evid. 403. Rule 403 can and should be used to bar the admission of evidence when its admission would interfere with the jury's ability to decide a case fairly.

a reasonable district court could not come to a conclusion contrary to our own without abusing its discretion. This Court has emphasized that "the trial judge is accorded the broadest discretion in determining whether evidence should be excluded under Rule 403." *Borden, Inc. v. Florida East Coast Ry. Co.*, 772 F.2d 750, 756 (11th Cir.1985). Despite our sincere concerns for the general presumption of admissibility of the kind of evidence at issue reflected in *Gonzalez*, we nevertheless conclude, giving the district court the "broadest discretion," that the lower court's Rule 403 ruling may stand. The district court heard Furbee's testimony and was in the best position to make the credibility determination that necessarily

factors in to a Rule 403 analysis.[8] We therefore affirm the district court's evidentiary ruling. We nevertheless caution the lower courts that the exclusion of potentially exculpatory evidence in conspiracy cases under Rule 403 should be the exception rather than the rule. Exclusion of evidence under Rule 403 is an unusual occurrence, and

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[8] The district court doubted Furbee's veracity, and believed that his recollections of the details of the conspiracy were sufficiently poor so as to raise substantial doubts as to whether his testimony related in any way to the indicted offense. These findings justified the exclusion of the evidence under Rule 403. Moreover, such findings are essentially factual determinations, which this Court will not reconsider unless clearly erroneous. The appellants have presented this Court no additional evidence suggesting that Furbee's familiarity with the details of the conspiracy was more substantial than the district court found it to be. Consequently, this Court has no basis from which to infer that the lower court's factual findings regarding he depth of Furbee's knowledge of the conspiracy were clearly erroneous.

this is doubly so in circumstances where the presumption is that the jury has the right to decide the evidentiary question of whether the evidence relates to the indicted conspiracy. *Gonzalez*, 940 F.2d at 1422.

[4] The district court also characterized Furbee's testimony as extrinsic evidence of specific actions offered for the purpose of impeaching the government witnesses' character, and held the evidence inadmissible under Rule 608(b). We reject this portion of the district court's analysis. A trial judge's discretion "does not extend to the exclusion of crucial relevant evidence establishing a valid defense." *United States v. Wasman*, 641 F.2d 326, 329 (5th Cir. April 1981). With regard to the lower court's application of Rule 608(b), we observe that even if Furbee's proffered evidence

was extrinsic, because it also "contradict[ed] material testimony ... it [was] relevant evidence and [could] no longer [be] considered collateral." *United States v. Russell*, 717 F.2d 518, 520 (11th Cir.1983). As this Court has explained, "[e]xtrinsic evidence of a witness' prior misconduct should be excluded where the evidence is probative only of the witness' general propensity for truthfulness; such evidence should be admitted, however, where it is introduced to disprove a specific fact material to the defendant's case." *United States v. Calle*, 822 F.2d at 1021. Furbee's proffered testimony was directly relevant to the material issue of the appellants' alleged participation in the smuggling operations. As such, it was more than evidence offered to impeach the credibility of the government's witnesses and could not be excluded under a Rule

608(b) analysis. Thus, we must reject the lower court's characterization of Furbee's testimony as mere character evidence. However, this does not affect he resolution of this case, because the district court's determination that Furbee's testimony failed Rule 403's prejudice balancing test is, by itself, sufficient to justify the district court's evidentiary ruling excluding portions of Furbee's proffered testimony.

B. ADMISSION OF EXTRINSIC EVIDENCE OF PRIOR DRUG SMUGGLING

The lower court allowed government witnesses to testify about prior, uncharged drug smuggling activities involving Nunez and Costa. Rule 404 prohibits the admission of extrinsic evidence of misconduct, except as provided in Rule 404(b). The lower court held that the evidence was admissible for the

legitimate purpose, under Rule 404(b), of establishing intent, a material element of the conspiracy charge. Nunez and Costa claim that the extrinsic evidence should not have been admitted, because it was prejudicial and they did not specifically challenge the existence of intent. This contention is without merit.

[5,6] In this Circuit, extrinsic evidence of unindicted bad acts is admissible if the evidence is relevant to an issue other than the defendant's character and the probative value of the evidence is not substantially outweighed by its potential for causing undue prejudice. *United States v. Hewes*, 729 F.2d 1302, 1314 (11th Cir.1984), *cert. denied sub nom.*, 469 U.S. 1110, 105 S.Ct. 7980 83 L.Ed.2d 783 (1985). Conspiracy was one of the substantive offenses at issue. One of the elements of conspiracy that the

prosecution must establish beyond a reasonable doubt is an intention to further the purposes of the conspiracy. Extrinsic evidence of past bad acts is admissible to establish intent, provided the judge offers a limiting instruction to the jury to the effect that the evidence may not be used to establish that the defendant acted in conformity with the past behavior. Fed.R.Evid. 404(b). *See United States v. Miller*, 883 F.2d 1540, 1544 n.4 (11th Cir.1989), *vacated pending en banc review*, 923 F.2d 158 (11th Cir.1991).

[7] The appellants claim that they never specifically "put intent at issue," and therefore that the government could not rely on intent as a basis for the admission of the evidence. However, "[t]he law in this Circuit provides that intent becomes a material issue whenever a defendant pleads not guilty to a charge of

conspiracy unless the defendant affirmatively withdraws the element of intent from the case." *United States v. Hernandez* 896 F.2d 513, 523 (11th Cir.), *cert. denied*, _ U.S. __ , 111 S.Ct. 159, 112 L.Ed.2d 125 (1990). Because the defendants did not affirmatively take the issue of intent out of contention by stipulating that they possessed the requisite intent, the district court did not abuse its discretion in admitting evidence of unindicted extrinsic bad acts. *United States v. Cardenas*, 895 F.2d 1338, 1342 (11th Cir. 1990).

[8] The second step for reviewing extrinsic evidence relates to whether the probative value of the evidence is outweighed by its prejudicial effect. The law in this Circuit requires that the Rule 404(b) evidence actually be necessary to establish the material element. *Hewes*, 729

F.2d at 1315-16. "The strength of the government's case is an important factor in determining the probative value of the extrinsic evidence. Extrinsic evidence is only relevant if it has a tendency to prove a fact that is at issue; thus, if the government's case is strong, there is no need for the evidence." *United States v. Miller* 883 F.2d at 1545 n.5. *See also Beechum*, 582 F.2d at 914 (strength of government's case a relevant factor when considering the probity of extrinsic bad acts evidence).

The government's case is not particularly strong on the issue of intent. Indeed, appellants in another argument suggest that the lower court's refusal to allow Furbee's testimony was sufficiently prejudicial to warrant a new trial because the government's only evidence of the appellants' participation in the conspiracy was testimonial. The

appellants cannot now gainsay that the admission of the extrinsic evidence was unnecessary because the government's case was sufficiently strong without it. Therefore, we hold that the district court did not abuse its discretion in admitting the extrinsic evidence of unindicted bad acts.

C. THE THREE IMPORTATION CHARGES

Costa and Nunez challenge their conviction on three counts of importing cocaine in the January 1985 importation. They argue that because the load started in one lump in the Bahamas and ultimately wound up as one lump in Florida, the fact that it actually came into the United States on three boats is irrelevant. Costa and Nunez claim that the three convictions for importating cocaine constitute multiplicitous convictions for the same offense. This argument lacks

merit.

[9,10] Although this court has condemned multiplicity when it exists, it does not exist on these facts. The government alleged conspiracy and three counts of importation. In order to avoid multiplicity, only one fact or element need be different between each charge. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). Section 952 of Title 21 criminalizes the importation of cocaine into the United States. 21 U.S.C.A. §952. Nothing in the statute suggests that one should aggregate the amount of drugs from the point of origin to the point of ultimate destination.[9] Rather, as each boat

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[9] Were this argument to hold true, then even if the cocaine were smuggled into the United States at different locations via various means of transportation, there should be only one violation of §952 provided that smugglers

entered the territorial waters of the United States, the particular crew violated §952. Because the importations were incident to a conspiracy, all members of the conspiracy are vicariously liable for each independent act in furtherance of the conspiracy. *Pinkerton v. United States*, 328 U.S. 640, 643-44, 646047, 66 S.Ct. 1180, 1181-82, 1183-84, 90 L.Ed. 1489 (1946).

Appellants claim that *United States v. Fiallo-Jacome*, 784 F.2d 1064 (11th Cir. 1986), supports their contention that sentences for these acts of importation are multiplicitous. *Fiallo-Jacome* held that when a defendant is convicted of possession of a specific amount of contraband over a period of time, the defendant may not also be convicted with possession of some portion of the same contraband on a

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are careful about ultimately reaggregating their goods.

specific date. *Id.* at 1066-67. The indictment in *Fiallo-Jacome* alleged possession over a four month period and then again on a specific date; the court concluded that Fiallo possessed the cocaine continuously, and could not be convicted twice for the same act of possession. On the present facts, the appellants were charged with three counts of importation and with a single count of conspiracy to import the entire amount. The conspiracy count does not merge with the importation counts, nor do the importation charges count the same quantity of cocaine twice. Thus, the appellants cannot avail themselves of the *Fiallo-Jacome* rule. This conclusion is consistent with this Court's clarification of *Fiallo-Jacome* in *United States v. Maldonado*, 849 F.2d 522 (11th Cir.1988). The *Maldonado* court held that there was no multiplicity where Maldonado was convicted on two

counts of possession because the counts did not charge Maldonado twice for possessing the same quantity of cocaine. *Id.* at 524. Likewise, because the indictment in the present case did not make an importation charge for the entire quantity of cocaine, the government was free to charge the appellants with importing three distinct quantities of cocaine in three separate vessels. *See United States v. Vaughan*, 859 F.2d 863, 865 (11th Cir.1988) (emphasizing that *Fiallo-Jacome* involved double charging for same quantity of drug), *cert. denied*, 490 U.S. 1065, 109 S.Ct. 2064, 104 L.Ed.2d (1989).

D. THE APPELLANTS' REMAINING SIX CLAIMS

Costa, Nunez, and Perry raise six additional arguments, none of which merits extended discussion. However, because the appellants have seen fit to raise them,

this Court will address each specific claim.

[11] All three appellants object to the district court's restrictions on the cross examination of government witness Ellsworth. The district court prohibited the appellants from quizzing Ellsworth on his views on the criminal justice system in general and the justice of his conviction in particular. The court allowed cross-examination for information regarding Ellsworth's plea agreement, for information about his involvement in the conspiracy, and for bias. Thus, the district court provided the defendants with the opportunity to cross-examine Ellsworth on any material issues. On these facts, there is no colorable claim that the court denied defendants their Sixth Amendment right to cross examine adverse witnesses. *United States v. Beale*, 921

F.2d 1412, 1424 (11th Cir.) *cert. denied*, __ U.S. __, 112 S.Ct. 100, __ L.Ed.2d __ (1991).

[12] Costa objects to the district court's order that he not be eligible for parole until he serves at least one third of his sentence (20 years). The district court made this order pursuant to 18 U.S.C.A. §4205(b)(1), which provides that a court may "designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court." This court in *United States v. Berry*, 839 F.2d 1487 (11th Cir.1988), *cert. denied*, 488 U.S. 1040, 109 S.Ct. 863, 102 L.Ed2d 987 (1989), held that §4205 allowed a district court to either advance or postpone parole eligibility. *Id.* at 1488-

89. Consequently, this argument is without merit.

[13] Nunez appeals the lower court's failure to find a violation of the court's Federal Rule of Evidence 615 sequestration order based on an out-of-court conversation between two government witnesses (Roberto and Ellsworth). The district court heard testimony on the alleged breach of its sequestration order, but concluded that the evidence did not support a finding that government witnesses Roberto and Ellsworth breached the order. Having made a factual finding that the order was not breached, the district court declined to call a mistrial, strike the witnesses' testimony, or instruct the jury that the witnesses violated the order. The court did, however, allow Perry to cross-examine the witnesses about any conversations that

they may have had during the pendency of the trial. The court did not allow Nunez to assert to the jury that the witnesses had violated the order, but did allow Nunez's counsel to tell the jury that the two witnesses had talked with each other about matters related to the pending case.[10] Because Nunez presents no evidence suggesting that the district court was clearly erroneous in finding that the witness did not breach the court's order, this Court will defer to the lower court's handling of this problem.

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[10] Nunez's argument lacks merit given the court's finding that the order was not violated. Cross-examination is one of the three remedies provided for violations of sequestration orders, although it must usually be accompanied by a court statement to the jury that the sequestration order was violated. *United States v. Lattimore*, 902 F.2d 902, 904 (11th Cir.1), *cert. denied*, ___ U.S. ___ , 111 S.Ct. 272, 112 L.Ed.2d 228 (1990).

[14] Appellant Perry argues that because the testimony regarding her involvement given by two government witnesses was not entirely consistent, she should have been acquitted pursuant to the Federal Rule of Criminal Procedure 29.[11] The witnesses' testimony was far from irreconcilable and to the extent there were differences they did not establish Perry's innocence. The court correctly rejected Perry's Rule 29 motion.

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[11] **Rule 29. Motion for Judgment of Acquittal (a) Motion Before Submission to Jury.** Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of [sic] its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

Perry and Nunez challenge the length of their sentences as being disproportionate to those given to other indictees in the conspiracy who pled guilty. However, "[a] sentencing judge has broad discretion in the imposition of criminal sentences." *United States v. Restrepo*, 832 F.2d 146, 148 (11th Cir.1987). The sentences at issue were all well within the statutorily authorized range. "As long as the sentence is within statutory limits and there is no showing of arbitrary capricious action amounting to an abuse of discretion, it will not be questioned on appeal." *United States v. Ard*, 731 F.2d 718, 727 (11th Cir.1984). This point lacks merit because the sentences were within the statutory limits and the appellants have produced no evidence suggesting that the district court acted arbitrarily and capriciously.

Finally, Perry asks for a reversal and a remand because the court admitted a "brown box" containing cocaine into evidence at trial. The cocaine found on the boat was in yellow and blue bags. Counsel for the United States explains that the brown box contained nine packages of cocaine and was merely used to carry the cocaine into the courtroom. The parties stipulated that the government discovered 162 packages of cocaine weighing 360 pounds on the seized boat. Moreover, Perry made no objection to the admission for the brown box at trial. This point is utterly without merit.

IV. CONCLUSION

For the foregoing reasons, the criminal convictions of appellants Costa, Nunez, and Perry are AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-5874

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

versus

MANUEL COSTA,
RENE TOTORICA NUNEZ,

Defendants/Appellants.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: FAY, Circuit Judge, JOHNSON*, Senior Circuit Judge and MERHIGE**, Senior District Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35,

Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT.

/s/
PETER FAY
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

v. JUDGMENT IN A CRIMINAL CASE

MANUEL J. COSTA

CASE NUMBER.
87-8021-CR-ZLOCH

Attorney for Defendant PAUL LAZARUS, ESQ.

THERE WAS A

[ ]finding [X] verdict of guilty as to count(s) 1, 2, 4, 5, 7, and 9.

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: Ct. 1 - conspiracy to import a quantity of cocaine in excess of one kilogram - 21:963;Ct/ 2 - conspiracy to possess with intent to distribute in excess of one kilogram of cocaine 21:846; Cts. 4, 5, 7, & 9 - importation of in excess of one kilogram of cocaine - 21:952(a),, 960(a)(1) and 18:2.

IT IS THE JUDGMENT OF THIS COURT THAT: as to Count 1, the defendant is hereby committed for imprisonment for a period of 20 years. As to Count 2, the defendant is hereby commited for imprisonment for a period of 20 years. Counts 1 and 2 are to run concurrently with each other.

CONTINUED ON PAGE 2

IT IS FURTHER ADJUDGED as to Count 4, the defendant is hereby committed for imprisonment for a period of 10 years.

As to Count 5, the defendant is hereby committed for imprisonment for a period of 10 years.

As to Count 7, the defendant is hereby committed or imprisonment for a period of 10 years.

As to Count 9, the defendant is hereby committed for imprisonment for a period of 10 years.

Said sentence on Counts 4, 5, 7, and 9 are to run consecutively to each other and consecutively to the sentence on Counts 1 and 2.

Pursuant to 18 USC Section 4205(1) and 4205(b)(1) the Court noting the amount of cocaine brought into this country by the defendant, the Court finds that the ends of justice and best interest of the public require that pursuant to Section 4205(a) the defendant Costa shall not be eligible for parole until serving one third of the 60 years or 20 years.

Bond, if any, is hereby exonerated.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $300.00 pursuant to Title 18 U.S.C.

Section 3013 for count(s) 1, 2, 4, 5, 7 and 9 as follows:

payable immediately to Clerk, U.S. District Court.

8/11/89
Dade of Imposition of Sentence

/s/
WILLIAM J. ZLOCH U.S. DISTRICT COURT

8/14/89
Date

No. 91-1849

In the Supreme Court of the United States

OCTOBER TERM, 1992

MANUEL COSTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
Assistant Attorney General
THOMAS M. GANNON
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QUESTIONS PRESENTED

1. Whether the district court properly sentenced petitioner to a 20-year minimum term under former 18 U.S.C. 4205 (1982), which was repealed as of November 1, 1987.

2. Whether the court of appeals should have conducted a *de novo* review of the trial court's decision that the probative value of a proffered witness's testimony was outweighed by its tendency to cause confusion.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1849

MANUEL COSTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 2-38) is reported at 947 F.2d 919.

JURISDICTION

The judgment of the court of appeals was entered on November 25, 1991. A petition for rehearing was denied on January 27, 1992. Pet. App. 39-40. The petition for a writ of certiorari was filed on April 20, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiring to import more than one kilogram of cocaine, in violation of 21 U.S.C. 963 (Count 1); conspiring to possess more than one kilogram of cocaine with the intent to distribute it, in violation of 21 U.S.C. 846 (Count 2); and importing more than one kilogram of cocaine, in violation of 21 U.S.C. 952(a) (Counts 4, 5, 7, and 9). The district court sentenced petitioner to concurrent 20-year terms of imprisonment on Counts 1 and 2, and to four consecutive ten-year terms of imprisonment on Counts 4, 5, 7, and 9. In addition, pursuant to 18 U.S.C. 4205 (1982), the court ordered that petitioner would not be eligible for parole until he had served 20 years of his 60-year sentence. The court of appeals affirmed. Pet. App. 2-38.

1. Between January and June of 1985, petitioner and several co-conspirators were involved in importing cocaine into the United States from the Bahamas. Over a period of approximately six months, various members of the conspiracy made four trips to the Bahamas. They picked up cocaine that had been flown to the Bahamas from Colombia, loaded the cocaine aboard boats, and returned to south Florida. Other members of the conspiracy assisted in offloading the cocaine once it arrived in the United States, guarding the loads, and carrying the cocaine to its final destination. The conspirators imported more than 1,800 kilograms of cocaine in that manner. Pet. App. 3-4; Gov't C.A. Br. 4.

2. a. At trial, petitioner's co-defendant, Rene Nunez, proffered the testimony of Roger Furbee. Outside the presence of the jury, Furbee testified that he

did not know petitioner, Nunez, or co-defendant Debra Perry, and that he had not been involved in a drug importation conspiracy or any drug trafficking incidents with them. However, Furbee said that in early 1985 he had been involved in importing shipments of cocaine with three of petitioner's co-conspirators, each of whom testified as a government witness. Furbee also testified that he was prepared to help offload the June 1985 shipment of cocaine that was intercepted by the Customs Service. Gov't C.A. Br. 15-16; Pet. C.A. Br. 6; Pet. App. 8.

The district court sustained the government's objections to Furbee's testimony about the first three shipments, under Fed. R. Evid. 608(b) and 403.[1] The court found that "the probative value [of the proffered testimony] is substantially outweighed by the danger of unfair prejudice and confusion of the issues." 31 R. 120. It precluded Furbee's testimony about the first three shipments under Rule 403 because, the court concluded, that testimony related to a different conspiracy than the one alleged in the indictment and would therefore tend to confuse the jury. The district court based its finding that the conspiracies were unrelated on Furbee's inability to recall certain details about the boats used to import the cocaine, and on differences between Furbee's recollection of the importation operations and the descriptions provided by other conspirators. The court also concluded that the defense was attempting to impeach the general

[1] Rule 608(b) prohibits the impeachment of a witness through extrinsic evidence, other than convictions, showing specific instances of misconduct. Rule 403 requires the exclusion of relevant evidence if its probative value is "substantially outweighed" by the evidence's tendency to cause undue prejudice or confusion.

credibility of the government witnesses with extrinsic evidence of specific misconduct unrelated to the conspiracy at issue in petitioner's trial, in violation of Rule 608(b). See Pet. App. 9-11. Although the district court was prepared to allow Furbee to testify about the June 1985 shipment, counsel for co-defendant Nunez stated that he would not call Furbee as a witness because he could not elicit meaningful testimony from him. Gov't C.A. Br. 17-18.

b. After imposing on petitioner a total sentence of 60 years' imprisonment, the district court stated: "Pursuant to 18 USC Section 4205[(a)] and 4205(b)(1) the Court noting the amount of cocaine brought into this country by [petitioner], the Court finds that the ends of justice and best interest of the public require that * * * [petitioner] shall not be eligible for parole until serving one third of the 60 years or 20 years." Pet. App. 42.

3. The court of appeals affirmed. Pet. App. 2-38.

a. The court acknowledged that it was "concerned" by the district court's exclusion of Furbee's testimony under Fed. R. Evid. 403. Pet. App. 11-12. In the court's view, the better practice in most circumstances is to admit evidence arguably relevant to a charged conspiracy and allow the jury to determine whether the evidence relates to the conspiracy alleged in the indictment. *Id.* at 13-17, relying on *United States* v. *Gonzalez*, 940 F.2d 1413, 1422 & n.17 (11th Cir. 1991), cert. denied, 112 S. Ct. 910 (1992). Thus, the court explained that if it were conducting a *de novo* review, it "would probably [have] admit[ted] all of Furbee's proffered testimony," Pet. App. 16, because the fact that he played a role in importing drugs with some of the conspirators, but claimed not to know petitioner, supported petitioner's claim of innocence. But the court of appeals was unwilling to conclude that the

district court had abused its discretion in excluding Furbee's testimony under Rule 403. Pet. App. 18. The court of appeals noted that the district court, which "was in the best position to make the credibility determination" necessary in a Rule 403 analysis, doubted Furbee's veracity and considered Furbee's recollection of details to be so poor that there were substantial doubts about its relevance to the charged offense. Pet. App. 18-19 & n.8.[2]

b. Petitioner had objected to the district court's order that he serve at least one-third of his sentence before becoming eligible for parole. See Pet. C.A. Br. 43-45. Relying on *United States* v. *Berry*, 839 F.2d 1487, 1488-1489 (11th Cir. 1988), cert. denied, 488 U.S. 1040 (1989), the court of appeals found that argument to be without merit. Pet. App. 33-34.

ARGUMENT

1. Petitioner first contends, Pet. 14-26, that the district court lacked authority to postpone his parole eligibility until he had served 20 years of his sentence.

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[2] The court of appeals reached a different conclusion with respect to the district court's reliance on Rule 608(b) as an additional ground for exclusion of Furbee's testimony. Pet. App. 20-22. Explaining that "[a] trial judge's discretion 'does not extend to the exclusion of crucial relevant evidence establishing a valid defense,'" *id.* at 20, quoting *United States* v. *Wasman*, 641 F.2d 326, 329 (5th Cir. 1981), and that Furbee's proffered evidence, even if extrinsic, "was directly relevant to the material issue of the appellants' alleged participation in the smuggling operations," the court determined that Furbee's testimony was not "mere character evidence," and should not have been excluded under Rule 608(b). Pet. App. 21-22. The court concluded, however, that the failure of the proffered testimony to survive the district court's balancing test under Rule 403 sufficiently justified its exclusion from evidence. Pet. App. 23.

He relies on former 18 U.S.C. 4205(a), which provided that a prisoner ordinarily would be eligible for parole after serving ten years of a sentence of more than 30 years' imprisonment.[3] Although former Section 4205(b)(1) authorized a district judge to order the postponement of a prisoner's sentence,[4] petitioner contends that the period of ineligibility may not exceed ten years.

Petitioner correctly notes that there is a conflict on this issue among the circuits. Some courts—including the court of appeals in this case—have relied on Section 4205(b)(1) as authorizing the imposition of a minimum term of up to one-third of the sentence imposed, even if that minimum term exceeds ten years. See *United States* v. *Varca*, 896 F.2d 900, 905-906 (5th Cir.), cert. denied, 111 S. Ct. 209 (1990); *United States* v. *Parker*, 881 F.2d 945 (10th Cir. 1989), cert. denied, 493 U.S. 1082 (1990); *United States* v. *Berry*, 839 F.2d 1487 (11th Cir. 1988), cert. denied, 488 U.S. 1040 (1989);

[3] Former Section 4205(a) provided:

> Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

[4] Former Section 4205(b) provided:

> Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court * * *.

United States v. *Gwaltney*, 790 F.2d 1378, 1387-1389 (9th Cir. 1986), cert. denied, 479 U.S. 1104 (1987); *Rothgeb* v. *United States*, 789 F.2d 647, 652 (8th Cir. 1986); *United States* v. *O'Driscoll*, 761 F.2d 589, 595-597 (10th Cir. 1985), cert. denied, 475 U.S. 1020 (1986). Other courts have held that Section 4205(a) overrode Section 4205(b) and limited the no-parole period to ten years, rather than one-third of the sentence that the court imposed. See *United States* v. *Hagen*, 869 F.2d 277, 280-281 (6th Cir.), cert. denied, 492 U.S. 911 (1989); *United States* v. *DiPasquale*, 859 F.2d 9, 13 (3d Cir. 1988); *United States* v. *Castonguay*, 843 F.2d 51, 52-56 (1st Cir. 1988); *United States* v. *Fountain*, 840 F.2d 509, 517-523 (7th Cir.), cert. denied, 488 U.S. 982 (1988).

Despite the conflict in the circuits, this issue does not warrant review by this Court, because it is of no continuing importance. Section 4205 was repealed effective November 1, 1987, by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, §§ 218(a)(5), 235, 98 Stat. 2027, 2031, as amended by Pub. L. No. 99-217, § 4, 99 Stat. 1728. The Sentencing Reform Act abolished parole, instituting in its place a system of determinate sentencing. Thus, the statutory construction issue presented by petitioner, which this Court has declined to review in the past,[5] affects only the rapidly diminishing set of cases involving prosecutions for criminal conduct completed before November 1, 1987.

[5] See, *e.g.*, *Varca* v. *United States*, 111 S. Ct. 209 (1990); *Parker* v. *United States*, 493 U.S. 1082 (1990); *Garcia* v. *United States*, 493 U.S. 963 (1989); *Whitworth* v. *United States*, 489 U.S. 1084 (1989); *Berry* v. *United States*, 488 U.S. 1040 (1989); *Gwaltney* v. *United States*, 479 U.S. 1104 (1987); *O'Driscoll* v. *United States*, 475 U.S. 1020 (1986).

2. Petitioner also contends, Pet. 27-36, that the court of appeals improperly used the "abuse of discretion" standard to review the district court's decision to exclude Roger Furbee's testimony, and instead should have subjected that decision to *de novo* review. That contention is without merit.

Petitioner concedes, Pet. 34, that in reviewing a trial court's rulings under Fed. R. Evid. 403, appellate courts are generally required to determine whether the lower court abused its discretion in a way that resulted in substantial prejudice to a defendant's rights. See *United States* v. *Shirley*, 884 F.2d 1130, 1132 (9th Cir. 1989); *United States* v. *Turk*, 722 F.2d 1439, 1441 (9th Cir. 1983), cert. denied, 469 U.S. 818 (1984); *United States* v. *Russell*, 703 F.2d 1243, 1249 (11th Cir. 1983); *United States* v. *Beechum*, 582 F.2d 898, 913-915 (5th Cir. 1978), cert. denied, 440 U.S. 920 (1979). In this case, the application of the abuse of discretion standard was entirely proper. As the court of appeals pointed out, Pet. App. 18-19 & n.8, the district court heard Furbee's testimony and was clearly in the best position to determine his credibility and the relevance of his testimony. See, *e.g.*, *United States* v. *Suggs*, 755 F.2d 1538, 1542 (11th Cir. 1985) ("[c]redibility choices are for the trial, not the appellate court"); see also *United States* v. *Cintolo*, 818 F.2d 980, 998 (1st Cir.) (trial court has "front row seat" and "unique vantage point" from which to make Rule 403 judgments), cert. denied, 484 U.S. 913 (1987).

As the court of appeals also noted, Pet. App. 19 n.8, the district court doubted the witness's veracity, see *United States* v. *Suggs*, 755 F.2d at 1542, and concluded that the witness's recollections of the details of the conspiracy in which he allegedly participated were so poor as to create substantial doubt that his testimony related "in any way" to the conspiracy charged in the

indictment. See *United States* v. *Esdaille*, 769 F.2d 104, 108 (2d Cir.) (trial court in superior position to evaluate likely impact of evidence under Rule 403), cert. denied, 474 U.S. 923 (1985); see also *United States* v. *Terebecki*, 692 F.2d 1345, 1350 (11th Cir. 1982) (evidence of another transaction properly excluded where evidence did not have relevance asserted by defendant); *United States* v. *Lyles*, 593 F.2d 182, 194-196 (2d Cir.) (proof of separate conspiracy not charged in indictment carried with it "serious potential for prejudice in the form of confusion of issues"), cert. denied, 440 U.S. 972 (1979).

The court of appeals correctly observed, Pet. App. 19 n.8, that these findings were "essentially factual," subject to review only for clear error, and that they sufficed to justify the exclusion of Furbee's testimony under Rule 403. See *Murray* v. *United States*, 487 U.S. 533, 543 (1988) ("it is the function of the District Court rather than the Court of Appeals to determine the facts"); *United States* v. *Gutierrez*, 931 F.2d 1482, 1491 (11th Cir.) (district court's findings of fact will be sustained unless clearly erroneous), cert. denied, 112 S. Ct. 321 (1991).[6]

[6] As noted above, the district court's decision to exclude Furbee's testimony was ultimately based on its *factual* determinations about the witness's veracity and the accuracy of his recollections. See, *e.g.*, *Murray* v. *United States*, 487 U.S. at 543 (function of district court, rather than court of appeals, is to determine facts). Accordingly, petitioner errs when he attempts, see Pet. 32-35, to characterize the court of appeals' decision as conflicting with other decisions holding that legal errors are subject to *de novo* review. See *United States* v. *Abayomi*, 820 F.2d 902, 908-909 (7th Cir.) (rejecting attempt to recharacterize evidentiary decision as constitutional issue and thus avoid review under abuse of discretion standard), cert. denied, 484 U.S. 866 (1987).

In addition, although the court of appeals might have reached a different conclusion than the district court about the admissibility of Furbee's testimony, see Pet. App. 16, that circumstance, as the court of appeals itself recognized, *id.* at 18, does not show that the district court abused its discretion in excluding the testimony. See, *e.g.*, *Crawford* v. *Edmonson*, 764 F.2d 479, 485 (7th Cir.), cert. denied, 474 U.S. 905 (1985); *United States* v. *Brannon*, 616 F.2d 413, 418 (9th Cir.), cert. denied, 447 U.S. 908 (1980).

Petitioner's final argument, that the district court's exclusion of Furbee's testimony deprived him of his Sixth Amendment right to present witnesses in his own defense, Pet. 35-36, is plainly meritless. A defendant's right to present evidence is not absolute. *Perry* v. *Rushen*, 713 F.2d 1447, 1450 (9th Cir. 1983), cert. denied, 469 U.S. 838 (1984). In the exercise of that right, a defendant must comply with established rules of procedure and evidence designed to assure fairness and reliability in the ascertainment of guilt and innocence. *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973) (right to confront witnesses). A trial judge has "wide latitude" to exclude evidence that is "marginally relevant" or poses an undue risk of "confusion of the issues." *Crane* v. *Kentucky*, 476 U.S. 683, 689-690 (1986), quoting *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986). A trial court's reasonable exercise of its discretion to conclude that the relevance of proffered testimony is substantially outweighed by its potential to cause confusion presents no constitutional issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1992

SUPREME COURT OF THE UNITED STATES

MANUEL COSTA *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 91-1849. Decided October 13, 1992

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE O'CONNOR joins, dissenting.

Petitioner Costa was convicted on various drug trafficking charges and sentenced to 60 years in prison. The district court ordered that he would not be eligible for parole until he served one third of his sentence (20 years). Before the Eleventh Circuit, petitioner argued that this latter provision violated 18 U. S. C. § 4205(a), which states that the maximum term of imprisonment prior to parole eligibility generally is (1) one-third of a sentence for a term of years, or (2) ten years of a life sentence and of a sentence of more than 30 years.

The Court of Appeals rejected this argument, relying on 18 U. S. C. § 4205(b)(1), which provides that a district court may "designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court." *United States* v. *Costa*, 947 F. 2d 919 (CA11 1991).

The Courts of Appeals have interpreted the interplay between subsections (a) and (b)(1) of the statute in conflicting ways. In holding that § 4205(b)(1) authorizes the sentencing court to disregard the 10-year ceiling for parole eligibility in § 4205(a), the Eleventh Circuit joined the Fifth, Ninth, Eighth and Tenth Circuits. See *United*

States v. *Varca*, 896 F. 2d 900, 905–906 (CA5), cert. denied, 111 S. Ct. 209 (1990); *United States* v. *Gwaltney*, 790 F. 2d 1378, 1388–1389 (CA9 1986), cert. denied, 479 U. S. 1104 (1987); *Rothgeb* v. *United States*, 789 F. 2d 647, 651–653 (CA8 1986); *United States* v. *O'Driscoll*, 761 F. 2d 589, 595–598 (CA10 1985), cert. denied, 475 U. S. 1020 (1986); see also *United States* v. *Berry*, 839 F. 2d 1487 (CA11 1988), cert. denied, 109 S. Ct. 863 (1989). Firmly to the contrary are the First, Third, Sixth and Seventh Circuits, which have held that § 4205 imposes a 10–year maximum before parole eligibility. Under this view, the purpose of subsection (b) was to allow judges to *reduce*, not to *extend*, the pre-parole eligibility period. See *United States* v. *Castonguay*, 843 F. 2d 51, 56 (CA1 1988); *United States* v. *DiPasquale*, 859 F. 2d 9, 13 (CA3 1988); *United States* v. *Hagen*, 869 F. 2d 277 (CA6), cert. denied, 109 S. Ct. 3228 (1989); *United States* v. *Fountain*, 840 F. 2d 509, 521 (CA7), cert. denied, 109 S. Ct 533 (1988).

Although the statute was repealed as of November 1, 1987, by the Sentencing Reform Act of 1984, it remains applicable to crimes committed before that date. As this case and others illustrate, the issue continues to arise. See *United States* v. *Faulkenberry*, 1992 U. S. App. LEXIS 14580 (CA9) (unpub.); *Frierson* v. *United States*, 932 F. 2d 967 (CA6 1991) (unpub.); *United States* v. *Beale*, 921 F. 2d 1412 (CA11), cert. denied, 112 S. Ct. 264 (1991); *United States* v. *Maravilla*, 907 F. 2d 216, 229 (CA1 1990). I would grant certiorari to resolve this split between the Circuits.